

**NO. 46222-2-II**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

**FRANK ANTHONY BARBARO**

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Erik Price, Judge  
The Honorable James Dixon, Judge  
The Honorable Anne Hirsch, Judge  
The Honorable Christine Schaller, Judge

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**BRIEF OF APPELLANT**

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it denied Mr. Barbaro a short continuance of his trial date to afford him additional time to consult with his attorney after the state's successful motion in limine precluded Mr. Barbaro from presenting his planned defense.

2. The trial court's denial of Mr. Barbaro's request to continue the trial deprived Mr. Barbaro of his state and federal constitutional right to adequate representation by a prepared defense counsel.

3. The trial court's refusal to grant Mr. Barbaro's requested continuance of the trial denied Mr. Barbaro due process.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion in denying Mr. Barbaro a short continuance of his trial date when the continuance was needed to allow time for Mr. Barbaro and his counsel to consult with each other and adequately prepare for trial after the court granted the state's motion in limine disallowed Mr. Barbaro's planned defense?

2. Did the denial of the trial continuance deny Mr. Barbaro his right to adequately prepared defense counsel and his right to due process?

C. STATEMENT OF THE CASE

1. Procedural History

The Thurston County prosecutor charged Frank Barbaro with Unlawful Possession of a Firearm in the First Degree<sup>1</sup> and Unlawful Possession of a Controlled Substance, Methamphetamine.<sup>2</sup> CP 3. Both charges were alleged to have occurred on November 30, 2013. CP 3.

Mr. Barbaro entered a not guilty plea on December 17. The court set the trial to begin the week of February 2, 2014. RP December 17, 2013, at 3. On February 5, the state and Mr. Barbaro asked the court to continue the trial date to allow additional time for testing the rifle Mr. Barbaro had allegedly possessed. RP February 5, 2014, at 3. The court set the trial to start the week of April 14. RP February 5, 2014, at 5.

At an April 9 pre-trial review hearing, the prosecutor indicated a willingness to try the case as scheduled even though he had two cases set for trial at the same time. Mr. Barbaro asked for a one week extension of the trial to give the court time to hear and decide, pre-trial, a state's motion in limine that, if granted, would eliminate Mr. Barbaro's planned defense. RP April 9, 2014, at 4-6. The court granted Mr. Barbaro's request. It continued the trial one week and set the state's motion in limine to be heard April 14. RP April 9, 2014, at 8.

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<sup>1</sup> RCW 9.41.040(1)

<sup>2</sup> RCW 69.50.4013

The court heard the state's motion as scheduled. RP April 14, 2014, at 3-33. The state moved to preclude the defense from (1) raising as an issue that Mr. Barbaro did not know the rifle was an actual operable firearm, and (2) precluding Mr. Barbaro from arguing the state had an affirmative duty to prove he knew the rifle was an operable firearm as defined by Washington law. RP April 14, 2014, at 3. The state argued *State v. Releford* 148 Wn. App. 478, 200 P.3d 729, review denied, 166 Wn.2d 1028 (2009) was on point. The court agreed and granted the state's motion. *Releford* held when prosecuting an unlawful possession of a firearm charge, it would be a misstatement of the law to instruct the jury that the state must prove the defendant knew the firearm was a working firearm.<sup>3</sup>

On April 16, Mr. Barbaro asked the court to continue the trial to the week of May 5. RP April 16, 2014, at 5. Mr. Barbaro's attorney told the court he needed additional time to consult with his client after the court's ruling in favor of the state's motion in limine precluded Mr. Barbaro's anticipated defense. RP April 16, 2014, at 5. The prosecutor opposed the continuance. RP April 16, 2014, at 6. He argued there was no good basis for the continuance and it was common for defense counsel to have to change tactics in response to court rulings. RP April 16, 2014,

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<sup>3</sup> The court later entered findings of fact and conclusions of law in support of its ruling. CP 17-21.



at 6. Additionally, the prosecutor complained he already had had to twice tell his witnesses of changes to the trial date. RP April 16, 2014, at 6. The court denied Mr. Barbaro's motion without explanation. RP April 16, 2014, at 7.

A jury heard the two day trial commencing on April 21. RP Trial. April 21-22, 2014, at 1-261.

Before jury selection, Mr. Barbaro pleaded guilty to Count II, Possession of a Controlled Substance. CP 4-12; RP Trial at 6-15.

The jury found Mr. Barbaro guilty of Unlawful Possession of a Firearm in the First Degree. CP 15; RP Trial at 255-56.

At sentencing, Mr. Barbaro agreed with the state's calculation of his offender score. CP 23; RP May 7, 2014, at 4, 9. The court imposed Mr. Barbaro's request for a prison-based drug offender alternative sentence. CP 25-26; RP May 7, 2014 at 6-19.

Mr. Barbaro appeals every portion of this judgment and sentence. CP 16-21.

## 2. Trial record

Before the taking of any testimony, Mr. Barbaro stipulated to having a prior conviction for a serious offense. CP 13-14. They read the following stipulation to the jury before opening statement:

The parties have agreed that certain facts are true. You must accept as true the following facts: Prior to November 30, 2013, the defendant, Frank Anthony Barbaro, was convicted of a serious offense.

RP Trial at 57.

On November 30, 2013, Frank Barbaro tried to pawn a replica muzzleloader rifle at Cash Northwest in Lacey. RP Trial 72-76. The pawn clerk refused to accept the rifle from Mr. Barbaro because he is a convicted felon. RP Trial at 79. Lacey Police Sergeant Adam Seig was at the pawn shop when Mr. Barbaro tried to pawn the rifle. RP Trial at 72, 74. Sergeant Seig followed Mr. Barbaro out of the business, arrested him, and took the rifle from him with his permission. RP Trial at 78-81. Mr. Barbaro told Sergeant Seig he obtained the rifle three to four days earlier, he knew he was not supposed to have it, and he was a convicted felon. RP Trial at 79, 82. From the sergeant's perspective, the gun appeared intact. RP Trial at 81. He placed the rifle in evidence. RP Trial at 83.

Lacey Police evidence technician clerk Emily Leining logged the rifle into evidence. RP Trial at 59 – 63. She also checked the rifle out of evidence and provided it to Lacey Police Detective Kevin Mercer. RP Trial at 63, 65. Detective Mercer asked retired Lacey Police Sergeant Robert Cecil to consult with him on the operability of the rifle as Detective Mercer was not adequately informed about muzzleloader-type

rifles. RP Trial at 100-03. Mr. Cecil had a great deal of expertise in the history and operability of all types of guns. RP Trial at 145-47.

Detective Mercer and Mr. Cecil took the rifle to a firing range on two days. RP Trial at 104-06. As part of his assessment of the rifle, Mr. Cecil pushed a clean cloth into its barrel. When removed, the clean cloth was dirty. That told Mr. Cecil that the rifle was previously fired. RP Trial at 161. Without making any modification to the rifle, Mr. Cecil was able to load and fire it even though the trigger did not work as it optimally should. RP Trial at 163-64. Detective Mercer made a video of Mr. Cecil firing the rifle. RP Trial at 109-10.

Mr. Cecil informed the jury about the history of the rifle. It was a Hawken model .50 caliber muzzleloader rifle manufactured in the early 1970s by Thompson Center.<sup>4</sup> RP Trial at 157. It was a replica of a muzzleloader rifle developed and marketed in the 1820s. RP Trial at 153. It was used for hunting large game and fired from the shoulder. RP Trial at 180-81. The replica model was popular in the 1970s and brought about an up tick in the popularity of hunters using muzzleloader rifles. RP Trial at 158. Because of its popularity, there were a significant number of Thompson Center muzzleloaders in circulation. RP Trial at 158. Muzzlerloaders differ from what is referred to as “modern firearms.” RP

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<sup>4</sup> Thompson Center is misidentified in the transcript as “Thompson Sinner.”

Trial at 153. This particular muzzleloader rifle, a percussion type, required three ammunition components to be loaded into it before it can be fired: a percussion cap, black powder, and a ball (or “cap”). RP Trial at 148-49. Modern firearms require loading just one cartridge. RP Trial at 154.

Mr. Barbaro did not testify and presented no witnesses. RP Trial at 194, 206.

#### D. ARGUMENT

THE COURT ABUSED ITS DISCRETION BY REFUSING TO GRANT MR. BARBARO A TWO WEEK TRIAL CONTINUANCE AFTER IT RULED MR. BARBARO COULD NOT RAISE HIS CHOSEN DEFENSE.

1. The trial court must use sound discretion when ruling on defense counsel’s motion to continue a trial.

In criminal cases, the decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. *State v. Downing*, 151 Wn.2d 265, 272-273, 87 P.3d 1169 (2004). The trial court’s decision to grant or deny motions for continuances are reviewed for abuse of discretion. *State v. Hurd*, 127 Wn.2d 592, 594, 902 P.2d 651 (1995); *Skagit Ry. & Lumber Co. v. Cole*, 2 Wn. 57, 62, 25 P. 1077 (1891). A trial court’s decision denying a continuance will not be disturbed unless the appellant makes “a clear showing ... [that the trial court’s] discretion [is] manifestly unreasonable, or exercised on untenable

grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (citing *MacKay v. MacKay*, 55 Wn.2d 344, 347 P.2d 1062 (1959)).

In exercising discretion to deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure. *Downing*, 151 Wn.2d at 273; *State v. Eller*, 84 Wn.2d 90, 95, 524 P.2d 242 (1974).

2. A criminal defendant is entitled to adequate time to consult with counsel and prepare for trial.

A criminal defendant is entitled to the effective assistance of counsel at trial. The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” U.S. Const. Amend VI. The provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Sec. 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel . . . .” The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *U.S. v. Salemo*, 61 F.3d 214, 221-222 (3<sup>rd</sup> Cir. 1995).

A defendant's right to counsel includes the allowance of sufficient opportunity for his counsel to prepare for trial. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *State v. Burri*, 87 Wn.2d 175, 550 P.2d 507 (1976); *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1963). The State constitutional right to have the assistance of counsel, Art. I, Sec. 22,<sup>5</sup> carries with it a reasonable time for consultation and preparation, and a denial is more than a mere abuse of discretion; it is a denial of due process of law in contravention of Art. I, Sec. 3 of the state constitution. *State v. Sain*, 34 Wn. App. 553, 558, 663 P.2d 493 (1983). Art. I, Sec. 3 provides, "No person shall be deprived of life, liberty, or property, without due process of law."

Our appellate courts recognize a trial court does not abuse its discretion when it continues a trial in order to allow counsel adequate time to prepare for trial. *State v. Flinn*, 154 Wn.2d 193, 199-200, 110 P.3d 748 (2005) (prosecution given additional time to prepare for defendant's diminished capacity defense); *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984) (recognizing defense counsel could not effectively represent defendant without more time given complexity and length of case). It is well established that a trial court may grant a continuance even

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<sup>5</sup> "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel[.]"

over a defendant's objection to allow counsel additional time to prepare for trial. *Id.*

Here, Mr. Barbaro articulated the need for just a short two-week extension of the trial date. To be adequately prepared for trial, he needed that time to consult with counsel about how to defend that case after the trial court ruled on the state's motion in limine precluding him from arguing, as he had planned to do, that he did not know the rifle was an actual working gun. Supplemental Designation of Clerk's Papers, Defense Memorandum of Authorities and Response to State's Motion in Limine (sub. nom. 21.) That explained why Mr. Barbaro, a convicted felon, took the rifle to a pawn shop (a keeper of records) to sell instead of simply anonymously selling the rifle on the open market to a willing buyer. Because the trial denied him the necessary continuance, Mr. Barbaro did not testify, did not present any witnesses, and was only left with the argument that the rifle was not operable. RP Trial at 194, 206, 234-45.

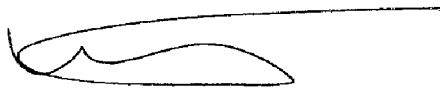
3. Mr. Barbaro is entitled to a new trial.

The appropriate remedy for an improper refusal to grant Mr. Barbaro a continuance is remand for a new trial. *State v. Santacruz-Hernandez*, 109 Wn. App. 329, 334, 40 P.3d 672 (2001).

E. CONCLUSION

Mr. Barbaro's conviction for Unlawful Possession of a Firearm in the First Degree should be reversed and remanded to the trial court for retrial.

Respectfully submitted this 4th day of December 2014.

A handwritten signature in black ink, appearing to read 'LISA E. TABBUT', with a long horizontal stroke extending to the right.

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LISA E. TABBUT/WSBA #21344  
Attorney for Frank Anthony Barbaro



### **CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief with: (1) James C. Powers, Thurston County Prosecutor's Office, at paoappeals@co.thurston.wa.us; d (2) the Court of Appeals, Division II; and (3) I mailed it to Frank Anthony Barbaro/DOC# 830277, Olympic Corrections Center, 11235 Hoh Mainline, Forks, WA 98331.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed December 4, 2014, in Longview, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', written over a horizontal line.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Frank Anthony Barbaro

## COWLITZ COUNTY ASSIGNED COUNSEL

**December 04, 2014 - 7:19 AM**

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